FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1450

LANDMARK COMMUNICATIONS, INC.,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

REPLY BRIEF OF APPELLANT

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At the heart of this appeal is an utterly irreconcilable dispute between Landmark and the Commonwealth of Virginia as to the essence of First Amendment protection. In this reply brief, we simply highlight the nature of that dispute, leaving to our main brief discussion of subsidiary issues raised by the appeal.

"If freedom of the press is used to undermine the confidence of the people in the institutions of our free society," the Commonwealth argues, "our free society may die." (Bf. 19) What is unprotected under the First Amendment, the Commonwealth argues, are "unfounded", "unwarranted" and "spurious attacks upon the judiciary . . . information which undermines the confidence of the people in the administration of justice" (Bf. 19-20); what is protected, the Commonwealth argues, is "fair criticism of the judiciary" (Bf. 21), criticism which does not "undermin[e] the trust and confidence of the average citizen in the administration of justice". (Bf. 28)

These are not irrational statements; they are not unreflective of some approaches, elsewhere in the world, to the governance of nations. But such assertions are, quite simply, at war with the First Amendment this nation has come to know.

It is hardly a matter of continuing constitutional dispute that "[s]uppression of the right of the press to praise or criticize governmental agents . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free".* Nor is the assumption sustainable "that respect for the judiciary can be won by shielding judges from published criticism", since "an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." ** Yet the Commonwealth seriously puts it forth that press freedom must yield when its exercise may "undermine . . . confidence" in the very governmental body being scrutinized by the press.***

It has recently been established by decisions of this Court that even commercial speech will, if true, be afforded

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* *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966).

** *Bridges* v. *California*, 314 U.S. 252, 270-71 (1941).

*** While it is by no means a precondition to the invalidity of the statute at issue on this appeal, the statute does, in fact, punish criticism which is, by any definition "warranted". Thus, a newspaper may be punished for discussing prior Commission proceedings against a judge who resigned from the Bench under pressure and then runs for public office again. It can hardly be contended that comment on his record is unwarranted in such circumstances. Similarly, a judge who is let off with a reprimand, where some might think harsher penalties in order, would be protected against press criticism under the Commonwealth's position—as would the Commission. It is hard to imagine how such criticism can possibly be deemed unwarranted.

a high degree of First Amendment protection; for the Commonwealth to assert that these decisions (discussed at pages 16-18 of our main brief) afford protection for the "hawking of one's wares in the marketplace" (Bf. 20) but *not* for the truthful speech at issue with respect to the performance of public officials in their public duties, misapprehends the entire thrust of both the commercial speech cases and other cases (such as this) involving a still higher degree of First Amendment protection.* This Court's conclusion in *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964) that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned" governs this appeal. For the Commonwealth to contend that *Garrison* does not "lend support to Landmark" (Bf. 20) is simply to ignore *Garrison*, not to distinguish it.**

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* The Commonwealth's misreading of the commercial speech cases is consistent with its misapprehension of the later history of cases such as *Gitlow* v. *New York*, 268 U.S. 652 (1925). The majority opinion in *Gitlow*—now relied upon by the Commonwealth (Bf. 23, n. 15)—was dissented from in an opinion of Justices Holmes and Brandeis so memorable in nature that "it would be disingenuous to deny that the dissent . . . had been treated with the respect usually afforded to a decision." *Dennis* v. *United States*, 341 U.S. 494, 541 (1950) (Frankfurter, *J.*, concurring). We note, in passing, that the Commonwealth's interpretation of *Dennis* itself (Bf. 24) is flatly inconsistent with the holding of that case. See our main brief at 35-37.

** The attempted distinction of *Garrison* by the Commonwealth is based upon the fact that the seditious libel there alleged was not required by statute to be kept "confidential" and that the views there expressed had been "based upon information obtained in the public domain." (Bf. 20) The first distinction is simply without meaning: the Louisiana criminal libel statute at issue in *Garrison* forbade free expression, just as the Virginia statute does in this case. The second purported distinction assumes that if the material used to criticize the judiciary in *Garrison* had not been in the public domain, the Louisiana statute would have been held constitutional, even though it exacted criminal punishment for the publication of truthful statements about public officials; nothing in *Garrison*, however, either suggests or would permit such a result.

Much of the Commonwealth's argument is dependent upon the notion that the decision as to what may be printed about activities of the State is one which the State itself and not the press may make. If *it* chooses, so the Commonwealth argues, it may not only determine not to release information to the public, but to punish for such disclosure as "may reasonably be thought to be inconsistent with the public interest."* (Bf. 10) Such a view is not only at odds with those cases carefully limiting criminal punishment of otherwise free expression to "narrowly limited classes of speech", *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571 (1942); it is so open ended as to permit criminal punishment for the publication of virtually anything a state would prefer to have go unsaid. Such views are hardly unique in a world in which press freedoms diminish further by the day.** They are utterly inconsistent with an approach as "intensely skeptical" as is that of this country to the adoption of "measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 259 (1974) (White, J., concurring).

As articulated by the Commonwealth, what it may keep confidential it may criminally punish the press for publishing; the contrary result, the Commonwealth urges, leads to a "kind of trial by battle and cleaverness *(sic)* between the State and the press" which "hardly seems the best way to further the various aims of a democratic society." (Bf.

* Significantly, this asserted standard departs from even the less than fulsome protection the clear and present danger standard—elsewhere embraced by the Commonwealth—mandates. Such a disregard of even the minimal protection afforded by the clear and present danger standard reflects the fundamental lack of interest in, and deference to, free expression which informs the Commonwealth's defense of the statute involved in this case.

** See, P. Galliner, *Annual Review of World Press Freedom* 7 (Int'l Press Institute 1976).

18) The difficulty with this submission, however, is that it wrongly equates the power of the Commonwealth to direct its own officials not to release information with a claim of power to punish the press for breach of confidentiality.* It is true that it would be far tidier—and that the State could stand far more assured that *nothing* would "leak"—if publication could be as easily punished as the Commonwealth desires. But it is just that kind of draconian and, ultimately, repressive logic that is rejected by First Amendment history.**

Much in the Commonwealth's brief is simply confused or misleading,*** but we leave detailed exposition of our

* As stated in our main brief, notwithstanding the routine presence of confidentiality provisions in state statutes establishing judicial fitness commissions, the only other state to have adopted any provision similar to that of Virginia is Hawaii. In that state, an individual who filed a complaint against a judge alleging his unfitness for the bench, was advised by the Hawaii Commission for Judicial Qualification that it would constitute a felony under H.R.S. § 610-3(b) if he disclosed *any* information about the charges filed by him. Thus, the effect of filing the charge was that of precluding the complainant—in perpetuity—from discussing his charges or the justness of their disposition by the Hawaii Commission. The complainant sought declaratory relief against the state on First Amendment grounds. The state's motion for summary judgment was granted (without written opinion) on April 20, 1977 and the case is now awaiting argument before the Supreme Court of Hawaii. *Parrington* v. *Hawaii,* Civ. No. 49320 (Cir.Ct. First Cir. 1977)

Although the various federal bills dealing with judicial discipline include confidentiality provisions, none contains any provision similar to that adopted in Virginia or Hawaii. *See,* H.R. 1850, 95th Cong., 1st Sess. (1977); S. 1423, 95th Cong., 1st Sess. (1977).

** As recently phrased by Attorney General Bell, "The press is not entitled to get a leak, but if they get one they have a right to print it." *The Atlanta Constitution,* Nov. 17, 1977, p. 2-A.

*** By way of example, at one point, the Commonwealth urges that under its statute the name of a complainant "is never made known to the judge under investigation"; later on the same page, the Commonwealth concedes that once a formal hearing is commenced, a judge is advised of the identity of all who testified before the Commission. (Bf 29) At still another point, the Com-

position to our main brief. What is fundamentally flawed in the Commonwealth's position is its underlying premise, a premise illustrated by its assertion that "[t]he public interest is not served by discussion of unfounded allegations of misconduct which defame honest judges . . . Courts, be they high or low, should and must be like Caesar's wife, above suspicion." (Bf. 28)

Such views are, we submit, as profoundly dangerous as they are constitutionally erroneous. It is not for the Commonwealth to decide when the "public interest" is best served by discussion—or the lack of it—as to the conduct of elected public officials. It is not for the Commonwealth to determine which "allegations of misconduct" of such public officials may or may not be discussed. And it is not for the Commonwealth to attempt to compel respect for any public official by fiat, let alone fiat which subjects to criminal sanctions all who report that such respect has not yet been universally achieved.

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monwealth urges that Landmark's demonstration of the constitutionally fatal overbreadth of the statute is too "hypothetical" and congratulates itself for its restraint in not indicting a witness before the Commission who sought court protection against a judge who fired her after her testimony—and in not indicting the newspaper which published the story. (Bf. 36-37) What the Commonwealth fails to state is that it *opposed* the temporary restraining order which protected Landmark from prosecution for publishing the story. In fact, much of the Commonwealth's opposition to the overbreadth argument appears to be directed at the very concept of overbreadth, ignoring the fact that all overbreadth arguments involve showings "that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973).

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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